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IN THE  
**Supreme Court of the United States**

No. 505.

OCTOBER TERM, 1941.

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LESTER A. CRANCER and GEORGE B. FLEISCH-  
MAN, Co-Partners, Doing Business Under the Firm  
Names of Valley Steel Products Company and Mid-  
Valley Steel Company, Respectively, *Petitioners and*  
*Appellants Below.*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and  
JOSEPH B. FLEMING, Trustees of the Chicago,  
Rock Island and Pacific Railway Company, a Corpora-  
tion, *Respondents and Appellees Below.*

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**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

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**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

**THE OPINIONS OF THE COURTS BELOW.**

No opinion was filed by the District Court and the  
opinion of the Circuit Court of Appeals has not yet been  
officially reported.

**JURISDICTION.**

It is the position of respondents that the petition for  
certiorari does not present either in form or substance  
any question for review by this Court.

## STATEMENT OF THE CASE.

Petitioners' statement of the matter involved is inaccurate, incomplete and obscure.

The case is well stated by the Circuit Court of Appeals in its opinion (R. 341-346), from which we quote, with footnotes citing supporting pages of the record, as follows:

"This appeal is from a judgment in favor of the Trustees of the Chicago, Rock Island and Pacific Railroad Company, and against appellants, Lester A. Crancer and George B. Fleischman, co-partners doing business under the firm names of Valley Steel Products Company and the Mid-Valley Steel Company respectively, for shipping charges on steel pipe thread protectors. The case was tried without a jury. At the conclusion of the trial the Court made findings of fact and stated conclusions of law, in writing, and entered judgment in favor of appellees for the sum of \$2,263.47.<sup>1</sup>

"The present controversy involves the proper classification of the commodity under the existing tariffs.<sup>2</sup> The shipments, seven car loads, moved from points in Montana, Texas, California and Louisiana where appellants had billed the cars to themselves at St. Louis, Missouri.<sup>3</sup> The billings classified the contents of the cars as 'scrap iron' and the tariff charge applicable to that classification was paid. When the shipments arrived at St. Louis, appellees' rate clerk requested the Western Weighing and Inspection Bureau to inspect the contents of the cars. That inspection resulted in a rating of the shipments as pipe

1. (R. 3-10, 29, 32, 292-5, 302-3.)

2. (R. 4-16, 12-13.)

3. (R. 25-29.)

fittings.<sup>4</sup> The classification 'pipe fittings' included thread or pipe protector rings.<sup>5</sup> The tariff rate on scrap iron being less than the rate on pipe thread protector rings, demand was made upon appellants for the difference on the tariff. Refusal to comply with that demand resulted in this action.<sup>6</sup>

. . . . .

"The commodity in question, referred to in various terms such as 'pipe protectors,' 'pipe fittings,' 'pipe thread protectors,' 'protecting rings,'<sup>7</sup> were found by the trial court to be used 'iron pipe thread protecting rings.'<sup>8</sup> These articles are used to protect the threads and the ends of pipe from injury in handling or shipment.<sup>9</sup> Appellants are engaged in the business of purchasing the used articles, repairing and re-selling them. All of the shipments were of the used articles which were being sent to appellants' plant at St. Louis.<sup>10</sup> The repairing or re-conditioning process consisted in a general way in a patented process of straightening those which were not too badly damaged and refinishing the threads. The remainder were useless except for re-melting.<sup>11</sup> One of the appellants, testifying on direct examination, indicated that approximately ninety per cent of the articles contained in these shipments could possibly be repaired for use.<sup>12</sup> On cross examination he stated that approximately sixty per cent were repaired and the remaining forty per cent discarded for re-melting.<sup>13</sup> There was other evidence to the same effect.<sup>14</sup> The articles were shipped in open coal cars. The good and bad were co-mingled, were loose in the cars, and none were bound or tied to-

4. (R. 36-40; 133.)

5. (R. 109, 110, 112-122, 128-137, 190-196.)

6. (R. 25-29.)

7. (R. 42, 55, 90, 93, 123.)

8. (R. 293.)

9. (R. 42, 90, 92, 123.)

10. (R. 215-223, 220-238, 245.)

11. (R. 199-209.)

12. (R. 210-211.)

13. (R. 237.)

14. (R. 161-176.)

gether in any way.<sup>15</sup> The tariff contained a provision that when a number of different articles were co-mingled in a car all should take the rating of the highest classed or rated article in the car.<sup>16</sup> The reclassification was based upon the following item of the tariff: 'Pipe Fittings:—rings, thread protecting, iron in packages.'<sup>17</sup> Appellants' proof tended to show that the thread protecting rings were made of steel. It is their contention that therefore the commodity did not fall within the classification of 'iron' pipe thread protecting rings. Numerous metal objects were elsewhere classified under the heading 'Iron or Steel.' That heading does not appear above the item 'Pipe Fittings' quoted above. There is, however, a tariff provision as follows: 'Unless the contrary appears, the word "iron" wherever used in this classification includes, also, steel; and vice-versa.'<sup>18</sup> Another provision of the tariff provided for a ten per cent penalty for shipment of articles such as these loose or uncrated and not in packages.<sup>19</sup> There was no difference in tariff rates on new and on used pipe protecting rings.<sup>20</sup>

"The classification relating to scrap iron provided that it should apply only to iron or steel having value for remelting purposes only.<sup>21</sup> . . .

"The trial court found that the shipments were not of scrap iron or steel possessing value only for re-melting purposes, but were of used 'iron pipe thread protecting rings.'<sup>22</sup> . . .

"The argument is advanced that the finding should be set aside because there was no proof that

15. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-142.)

16. (R. 130-131, 190-196.)

17. (R. 109, 110, 112-122, 128-137, 190-196.)

18. (R. 153, 286.)

19. (R. 113-119, 121, 128-9, 190-196.)

20. (R. 194, 290.)

21. (R. 132-3, 157-9, 190-196, 285-292.)

22. (P. 293, 294.)

the articles had a market or commercial value for any purpose other than for remelting. Appellants' evidence showed that these seven and a great many more carloads of pipe thread protectors were purchased by them for reconditioning purposes.<sup>23</sup> There was substantial evidence that a fairly well established price existed for used pipe thread protectors in the territory where they were available.<sup>24</sup> • • •

• • • In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron.<sup>25</sup> • • •

• • • "The evidence is uncontroverted that the major portion of each car load of the shipments involved were used pipe thread protecting rings and were shipped loose and co-mingled in the cars.<sup>26</sup> As heretofore demonstrated the proof justified the classification of the major portion of each shipment as pipe fittings consistent of used iron pipe thread protecting rings and not as scrap iron having a value for remelting purposes only.

"The Tariff heretofore quoted in the margin provided that when articles were shipped in a mixed carload the classification applicable to the highest classed or rated article in the car should apply.<sup>27</sup> • • •"

As stated by petitioners, respondents, plaintiffs in the District Court, introduced in evidence at the trial, over

23. (R. 199-209, 220-238, 245, 257-268.)

24. (R. 161-176, 220-238, 245.)

25. (R. 161-176, 199-209, 220-238, 245.)

26. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-9, 142, 210-211, 237.)

27. (R. 130-131.)

objection of petitioners, defendants, the opinion and report of the Interstate Commerce Commission, in the case of *Crancer, et al., v. Abilene & Southern Railway Company, et al.*, 223 I.C.C. 375 (R. 190-195). That case involved a complaint before the Commission, filed by the defendants against a number of railroads, in which the defendants asserted that shipments of iron or steel thread protecting rings similar to the shipments involved in the case at bar should be classified under the freight tariffs as scrap iron and that class or commodity rates on pipe fittings were inapplicable and unreasonable. The Commission, on August 6, 1937, held scrap iron rates inapplicable and class or commodity on pipe fittings applicable and reasonable, and dismissed the complaint (R. 190-195, 223 I.C.C. 375).

It may also be stated that on March 16, 1939, the same day upon which the complaint in the case at bar was filed (R. 3), the defendants filed with the Interstate Commerce Commission another complaint similar to the one dismissed by the Commission on August 6, 1937, again complaining that rates on used iron or steel pipe fitting protecting rings in excess of scrap iron rates were unreasonable and inapplicable (R. 14, 17-24); that after some delay the said last named complaint was set for hearing before an Examiner of the Commission on February 29, 1940 (R. 33-4); that by motion for a continuance filed and denied in the District Court before trial (R. 14, 24-5), by application to the Circuit Court of Appeals for prohibition filed and denied by the Court before trial (R. 25, 33), and by objection made and overruled at the beginning of the trial of the case at bar on January 31, 1940, to February 7, 1940 (R. 32-34), defendants sought the postponement or stay of the trial of the case until the determination by the Interstate Commerce Commission of the second, last mentioned complaint of defendants.

At page 6 of their petition petitioners refer to a decision of the Interstate Commerce Commission on February 18, 1941, upon the said second complaint of the petitioners before the Commission, and attach as an appendix to their petition and brief, pages 23 to 34, the decision of the Commission so referred to, in which it was again held that scrap iron rates were not applicable to shipments such as those in suit but that class or commodity rates were in part unreasonable.

The reference to this decision of the Interstate Commerce Commission of February 18, 1941, following the completion of the trial in the case at bar and the judgment entered on February 7, 1940 (R. 302-3), is of course a reference to matter outside of the record. The reference to this decision of the Interstate Commerce Commission as an effective and current ruling of the Commission is also lacking in candor. As appears from a certified copy of the subsequent proceedings of the Commission, which we have filed with the clerk of this Court, the decision of February 18, 1941, has been suspended and the case set down for further hearing before an Examiner of the Commission on September 12, 1941.

## ARGUMENT.

The petition for certiorari (page 7) refers the Court to the rambling and obscure statement of the "Matter Involved" for the "Questions Presented." As "Reasons Relied On for the Allowance of the Writ," the petition merely avers that the opinion of the Circuit Court of Appeals decided a Federal question in a way in conflict with applicable decisions of this Court and cites a number of decisions, without indicating the questions ruled or the respect in which it is claimed that the opinion of the Circuit Court of Appeals is in conflict with the decisions cited, other than to refer the Court to the brief of petitioners in support of the petition. The brief (pages 9 to 21) sets out and argues three specifications of error. Paragraph 2 of Rule 38 of this Court permits a brief in support of a petition for certiorari, but the petition must be complete in itself and the requirements for the petition prescribed by the rule cannot be supplied by the supporting brief. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-8; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357.

If the Court should conclude, however, that the petition is sufficient to raise the points mentioned and argued in petitioners' brief, the points are without merit and present no question for review by this Court. We discuss them in the order in which they are set out in petitioners' brief.

### I.

The Circuit Court of Appeals did not err in sustaining the judgment for additional freight charges. The Court correctly held that the judgment was

properly and abundantly supported by the trial court's findings of fact that the shipments were not scrap iron or steel having value for remelting purposes only, but were used iron or steel pipe thread protecting rings. By defendants' own evidence the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants, without remelting. By the evidence of both parties a substantial and major portion of each of the shipments was used pipe thread protective rings, having an established market value as such and not of value for remelting purposes only. The Circuit Court of Appeals ruled in conformity with the applicable decisions of this Court and not in conflict with any of its decisions.

Petitioners argue that the District Court "must have based its judgment upon the theory" that the shipments were not scrap "because they were not used as scrap for remelting purposes only," because the trial court stated orally at the trial that he did not think that the shipments were "scrap iron" and observed that "the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way" (R. 292).

The trial court expressly found (R. 293-4) that the tariffs applicable to all the shipments provided rates for shipments of pipe fittings described as iron or steel thread protecting rings;<sup>1</sup> that the tariffs provided that when a number of different articles were commingled in a car all should take the rating of the highest classed or rated article in the car;<sup>2</sup> that each of the earload shipments involved contained iron or steel thread protecting rings so described in the tariffs;<sup>3</sup> that the tariffs applicable to

1. (R. 109, 110, 112-122, 128-137, 190-196.)

2. (R. 130-131, 190-196.)

3. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 132-9, 142.)

shipments between the points in question provided that ratings on scrap iron or steel applied only to iron or steel having value for remelting purposes only;<sup>4</sup> that the iron or steel thread protecting rings in the seven shipments were not iron or steel having value for remelting purposes only.<sup>5</sup>

These findings of fact are abundantly supported by the evidence which appears on the pages of the record cited in the above indicated footnotes. Indeed, there was no evidence to the contrary and petitioners do not contend for any.

As pointed out by the Circuit Court of Appeals (R. 344-5), the findings that the shipments were used thread protecting rings and not scrap iron or steel of value for remelting purposes only, are supported not only by defendants' own evidence that the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants without remelting (R. 199-209, 220-238, 245, 257-268), but also by an abundance of evidence (by both parties) to the effect that the articles were used pipe thread protectives, having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, 245).

Petitioners could not complain of the findings of fact and judgment even if the testimony as to the purpose for which petitioners were buying the shipments in question and other shipments, and the use to which they in fact put these shipments and other similar shipments, had been incompetent and inadmissible, since, as above pointed

4. (R. 132-3, 157-9, 190-196, 285-292.)

5. (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, 245.)

out, the findings and judgment were amply supported by other evidence of both parties, that the shipments in question contained pipe thread protecting rings having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, 245). Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609. Supported as they are by substantial and abundant competent evidence the concurrent findings of fact of the District Court and the Circuit Court of Appeals are conclusive. *Virginian Railway Co. v. Federation*, 300 U. S. 515, 542, and cases cited; *United States v. O'Donnell*, 303 U. S. 301, 508, and cases cited; Rule 52(a) Federal Rules of Civil Procedure.

There is, however, no merit to the contention of petitioners that the evidence as to the use to which the shipments in question and other shipments were put was not competent and material, and proper basis for a finding that the shipments in question were not scrap iron, having value for remelting purposes only.

In support of their argument petitioners cite two decisions by this Court, *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, and *Interstate Commerce Commission v. B. & O. Railroad*, 225 U. S. 326. In the Lackawanna case it was held that the manner in which shipments of definitely identified articles were owned and assembled for shipment in one car could not change the shipment from a carload shipment as designated in the tariffs. In the B. & O. case it was held that the mere fact that coal which was the subject of shipment belonged to a railroad could

not change or destroy the classification of the coal under the tariffs; that the tariffs provided rates for the shipment of coal regardless of whether owned by a dealer or a railroad.

Neither of these cases has any application or in anywise supports petitioners' argument. The character and classification of the articles in shipment, under the tariffs, was a matter in dispute in the case at bar. The evidence as to the use for which the articles were purchased and to which they were put, was material and competent, not for the purpose of changing the character and classification of the articles, but for the purpose of determining their character and classification. The two decisions cited by petitioners do not hold, and this Court has never held, that the use to which articles are put is not some evidence of the character of the articles.

It is immaterial whether the two Interstate Commerce Commission cases cited on pages 12 and 13 of petitioners' brief support petitioners' contention. If they did there would still be involved no ruling of the Circuit Court of Appeals in conflict with applicable decisions of this Court. Nor do they establish any applicable rule or decision of the Interstate Commerce Commission. In the more recent decisions of the Commission upon the very question now raised by petitioners, upon the petitioners' own complaint, the Commission ruled the contention against petitioners:

"In *Wisconsin Waste & Wiper Co. v. Chicago & N. W. Ry. Co.*, 196 I.C.C. 459, 460, Division 5 said the use to which a commodity is put is not determinative of the applicable rate, but that the use may be considered in determining the nature of the commodity" (*Crancer, et al. v. Abilene & Southern Railway Co.*, 223 I.C.C. 375, R. 192).

At page 10 of their brief petitioners refer to testimony by one of the petitioners that he assembled at petitioners' plant and loaded and shipped to a mill for remelting purposes a car of thread protectors (R. 247-8). Petitioners themselves thus appear to argue that the use to which this particular car of thread protectors was put, to-wit, remelting, established the character of the shipment as scrap iron, having value for remelting purposes only. We concede that the use for which it was shipped and to which it was put was evidence that the particular shipment was scrap iron. The shipment so testified to by the petitioner was doubtless a shipment of rings which he could not recondition and which were, therefore, in fact of value for remelting purposes only, and, therefore, scrap iron. Petitioner did not testify that this car which he shipped as scrap iron was made up of any of the protectors involved in the shipments in question, nor would it have mattered if it had, since the shipments in suit contained substantial quantities of thread protectors which had value other than for remelting purposes and since the highest classified article controlled as to the rate on each car.

It is of course to be pointed out that the evidence as to the use for which the shipments in question and other shipments of like character were put was not merely evidence of a casual or accidental use. On the contrary, the evidence in question was to the effect that the shipments in question and many other similar shipments were purchased by defendants for the purpose of reconditioning, without remelting, and that from sixty to ninety per cent of the shipments in question and other shipments of like character to petitioners and others over a period of years were capable of being reconditioned and were in fact reconditioned without remelting, for sale as used thread protecting rings (R. 199-209, 220-238, 245, 257-268, 161-176).

The Circuit Court of Appeals disposed of the contention of petitioners in the following manner (R. 345-6):

"It is further contended that the finding that the pipe thread protectors did not possess a commercial or market value for remelting purposes only, was based solely upon testimony that appellants purchased the articles for reconditioning purposes and not for remelting purposes. Obviously, if the articles were scrap iron fit for remelting purposes only, their purchase by appellants for another purpose would not change the character of the articles. Nor should one rate be applied to the shipment of an article to be used for one purpose and another rate be applied to the shipment of the same article when it is to be used for another purpose. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 225 U. S. 326. But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were. In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron. If, as in *A. T. & S. F. R. Co. et al. v. U. S. ex rel. Sonken-Galamba Co.*, 98 F. (2d) 457, it had been conceded that the articles had no commercial value except for remelting purposes, or, as in *I.C.C. v. B. & O. R. Co.*, *supra*, the character of the commodity was uncontroverted, the mere fact that appellants had inadvertently paid more for the articles than they were worth for remelting purposes or purchased them for reconditioning purposes when in fact the articles were actually only scrap iron having a value only for remelting purposes, would not change their conceded value or uncontroverted character. But such is not the present case. Here, both the value of the articles and their character were disputed issues. In fact the determination of those issues was of controlling im-

portance. A preponderance of the evidence supports the finding of the trial court both as to the value of the articles and their character."

The Circuit Court of Appeals ruled soundly and without conflict with any decision of this Court. The first specification of petitioners' brief is without merit and presents no question for review by this Court.

## II.

**The Circuit Court of Appeals did not err in the holding that no reversible error was committed in admitting in evidence the decision of the Interstate Commerce Commission in *Crancer, et al. v. Abilene & Southern Ry. Co., et al.*, 223 I.C.C. 375 (R. 190-195), and the ruling presents no question for review.**

Petitioners appear to argue that the decision of the Interstate Commerce Commission upon their complaint of the reasonableness of class or commodity rates upon shipments similar to those in the case at bar, determined against them by the Commission on August 6, 1937 (223 I.C.C. 375, R. 190-195), was inadmissible because it was not *res adjudicata* as to character of the shipments and the applicable rates in the case at bar. They cite no decision of this Court on the point and rely solely upon a District Court decision cited on page 16 of their brief to the effect that a judgment as to the character of one shipment is not *res adjudicata* as to the character of another shipment.

Of course the Interstate Commerce Commission decision in question was not *res adjudicata*. It was not offered as determining the case at bar but merely as evidence of the valid tariff provisions (R. 189, 190, 195). It was competent evidence and clearly admissible. *Lowden, et al., v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 519-520; *A. J. Phillips Co. v. Grand Trunk W. Ry. Co.*, 236 U.

S. 662, 664; *Robinson v. B. & O. Rd. Co.*, 222 U. S. 506, 511, 512.

The Circuit Court of Appeals sufficiently disposed of the point as follows (R. 347):

"Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*. There was no error in calling it to the Court's attention."

Even had the admission of the decision been error the error would have been harmless since the Court's findings and judgment were supported by sufficient and abundant competent evidence. Rule 61, Federal Rules of Civil Procedure; *Martin v. Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson v. United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall v. United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co. v. McLaughlin*, 9 Cir., 85 F. (2d) 606, 609.

Petitioners' Point II is wholly without merit and involves no possible ground for review by this Court.

### III.

**Petitioners' specification that the District Court should not have proceeded with the trial of the case while petitioners' second complaint before the Interstate Commerce Commission in respect to the reasonableness of tariff rates was pending, is without merit and raises no question for review by this Court.**

Petitioners' complaint before the Interstate Commerce Commission (R. 17-24) which they contend should have

postponed or stayed the trial of the case at bar raised the same question before the Commission which the Commission decided against petitioners in *Crancer, et al., v. Abilene & Southern Ry. Co.*, 223 I.C.C. 375 (R. 190-195). They have contended that the adjudication of the Commission against them in the former case was not even admissible in evidence in the case at bar. They say that their second complaint before the Commission was filed on March 10, 1939. The record discloses that petitioners' motion for stay in which they set up the complaint avers that the complaint was filed on or about March 16, 1939 (R. 14), which is the same day the petition in the case at bar was filed in the District Court (R. 3). In any event the complaint which they say should have stayed this court action by respondents to collect the lawful freight charges provided by the existing tariffs, was filed on the same day or shortly before the petition of respondents. If a suit or threatened suit or claim could be stayed by the mere filing of a complaint to the Interstate Commerce Commission attacking the reasonableness of lawful rates before the Interstate Commerce Commission, it would be impossible for the rail carriers to make prompt collection of undercharges shown by established and existing freight tariffs from such shippers as had ingenuity enough to file complaints to the Commission. This would result in discrimination and manifestly cannot be the law.

The decisions of this Court upon which petitioners rely in support of their contention that the present lawsuit should have been stayed, are all cases involving administrative questions necessary to be determined in the first instance by the Interstate Commerce Commission. *Great Northern Ry. Co. v. Merchants' Elevator*, 59 U. S. 285, was a suit by a shipper for reparation or damages as for the collection of unreasonable and unlawful rates.

Recovery was denied the shipper on the ground that the shipper as well as the carrier was bound by the rates fixed by the tariffs on file with the Commission, unless and until the Commission held those rates unreasonable and set them aside. The case is authority against petitioners since the case at bar is a suit upon tariffs regularly on file with the Commission which had not been declared unreasonable by the Commission. *Robinson v. B. & O. Rd. Co.*, 222 U. S. 506, also relied upon by petitioners, is similar to the Great Northern Railway Company case and similarly authority against petitioners. *Texas & Pacific Railway Co. v. American Tie & Timber Co.*, 234 U. S. 138, relied upon by petitioners, involved the question of the rate on cross ties which was not clearly fixed by any tariff on file and had never been determined by the Commission. The tariffs definitely and clearly fixed rates on thread protecting rings of value for purposes other than remelting and not scrap iron having value for remelting purposes only, and the Commission had previously determined that said tariff provisions sued upon by respondents were reasonable and applicable to shipments such as the evidence disclosed those in question to be, in *Crancer, et al. v. Abilene & Southern Ry. Co. et al.*, 223 I.C.C. 375. Review was denied in *Crancer v. United States*, D. C. Mo., 23 Fed. Supp. 390, affirmed 305 U. S. 567.

*General American Tank Corp. v. Eldorado Terminal Co.*, 308 U. S. 422, the remaining case cited by petitioners, was an action by a shipper to recover compensation for freight cars furnished for transportation of its products. Under the existing tariffs and rules of the Interstate Commerce Commission compensation for the use of the cars was required to be paid to the car company from which the shipper leased them. This Court held that the shipper must first apply to the Interstate Commerce

Commission and obtain a change by the Commission in the tariffs and rules, before relief could be obtained (308 U. S. l. c. 431). In other words, the shipper had to obtain relief from the Commission in the first instance because it was seeking relief contrary to the existing tariffs and rules of the Commission.

Unless and until tariffs filed with the Commission have been superseded by a final order of the Commission the tariff rate is the lawful rate, it is the duty of the carrier to collect the full tariff rate, and unlawful for the carrier to acquiesce in anything less than the full tariff rate. *Pennsylvania R. R. v. International Coal & Mining Co.*, 230 U. S. 184, 197; *Lowden, et al., Trustees, v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520.

In the *International Coal Mining Company* case the Court said (230 U. S. l. c. 197):

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

In the *Lowden* case the Court said (306 U. S. 520):

"Until changed, tariffs bind both carriers and shippers with force of law."

If the carrier has collected less than the current tariff rate it is its duty to sue for the balance and there is no defense to such suit. *Pittsburgh, etc., R. R. v. Fink*, 250 U. S. 577.

It was the right and the duty of the respondents to enforce the lawful rates fixed by the existing tariffs.

They have exercised that right and fulfilled that duty, and obtained a judgment based upon the existing tariffs for lawful charges fixed thereby.

Petitioners have attached as an appendix to their petition and brief, pages 23 to 34, a decision of the Commission upon petitioners' last complaint of the reasonableness of the existing tariffs, handed down by the Commission on February 18, 1941. In their petition and also at page 18 of their brief they refer to it as an effective and current ruling of the Commission, although as pointed out in our statement of the case a certified copy of the subsequent proceedings of the Commission which we have filed with the clerk of this Court discloses that the decision has been suspended and the case set down for further hearing. If this decision of the Commission were final the reference to it would be outside the record and the decision could not be considered for the purpose of impeaching the judgment which became final before it was rendered. *Realty Acceptance Corp. v. Montgomery*, 284 U. S. 547, 551. If it were a final decision petitioners would have a complete remedy under it by way of reparation upon payment of the judgment in question. *Pennsylvania Railroad v. International Coal & Mining Co.*, 230 U. S. 184, 197. If petitioners finally succeed in obtaining some modification of the tariffs by the Commission, which would affect the charges here in judgment, petitioners will have a complete remedy by reparation to the extent of the modification of the rates granted. It is to be observed that the decision of the Commission of February 18, 1941, referred to by petitioners, holds against petitioners' claim that scrap iron rates are applicable but names an intermediate rate as reasonable. Should such a ruling finally be adopted and become final petitioners would be entitled to reparation only as to part of the judgment here involved.

The Circuit Court of Appeals disposed of petitioners' point that the action should have been stayed pending petitioners' currently filed complaint to the Commission of the reasonableness of the rates as follows (R. 347-8):

"Appellants' last contention is that the Court should not have proceeded with this trial because there was pending at the time a proceeding before the Interstate Commerce Commission involving the reasonableness of the rates on used pipe thread protectors. The mere statement of the question suggests the answer. The reasonableness of the rates was not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was. 'Until changed the tariffs bound both carriers and shippers with the force of law.' *Lowden v. Simonds, etc., Grain Co.*, 306 U. S. 516, l. c. 520. Even if, as indicated by counsel in oral argument, the Interstate Commerce Commission determined that the existing rates prescribed on used pipe thread protectors was unreasonable, fixed another rate therefor, and granted reparation rights, this action does not fail. *Lowden v. Simonds, etc.; Grain Co., supra*. There was no administrative problem involved, the determination of which is committed to the Interstate Commerce Commission, hence the case of *General American Tank Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, are inapplicable."

The Court ruled soundly and in accord with all the applicable decisions of this Court. The third and last point of petitioners' brief is without merit and raises no question for review.

**Conclusion.**

It is respectfully submitted, that no question for review is presented by petitioners and that their petition should be denied.

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Kansas City, Missouri,  
September 8, 1941.